No. 102819-9

SUPREME COURT
OF THE STATE OF WASHINGTON

AMY BIGGS,

Petitioner,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

GORDON TILDEN
THOMAS & CORDELL LLP
Jeffrey M. Thomas, WSBA #21175
Mark Wilner, WSBA #31550
Matthew F. Pierce, WSBA #34019
600 University Street, Suite 2915
Seattle, WA 98101
Tel. 206.467.6477

ATTORNEYS FOR RESPONDENT
PUGET SOUND ENERGY, INC.

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I. INTRODUCTION

The Court should deny Petitioner Amy Biggs' Petition for Review of Division One's unanimous unpublished opinion. The Court of Appeals properly held that Biggs' entry into the day-use park of Respondent Puget Sound Energy ("PSE") after the park had undisputedly closed renders her a trespasser as a matter law, and the "constant trespasser" exception does not apply in Washington. The decision is supported by black-letter Washington premises liability law. Biggs has neither identified any conflicting Washington appellate opinion, nor any other basis for this Court's review under RAP 13.4(b).

II. STATEMENT OF CASE

A. PSE Allows the Public to Enjoy Snoqualmie Falls Park During the Day—the Park Is Undisputedly Closed From Dusk Until Dawn.

PSE owns, maintains, and operates the Snoqualmie Falls Hydroelectric Project ("Project") in Snoqualmie. CP 99, 102-167, 169-188. The Project is subject to a license issued by the Federal Energy Regulatory Commission ("FERC"). *Id*. The

Project consists of a diversion dam upstream from Snoqualmie Falls (the "Falls"), two powerhouses, and Snoqualmie Falls Park (the "Park"). *Id.*

The Falls is the Project's major recreational attraction. CP 117. The public visits every day, year-round. *Id.* The predominant activities for Park visitors include outdoor recreation such as scenic viewing of the Falls, hiking, and picnicking. *Id.* The Park contains picnic areas, restrooms, educational signs, and observation areas for viewing the Falls. CP 314-315. The lower park offers a trail through a forested wildlife habitat, a launch area for canoes and kayaks, historic interpretive displays, and an observation platform for viewing the Falls. *Id*. The upper park, located next to the Salish Lodge, contains paved pathways, education kiosks and signs, and an observation deck for viewing the Falls. *Id*.

1. PSE Posts Signs Throughout Park Grounds Warning the Park Closes Daily at Dusk.

The Park is open and available for public use daily, from dawn until dusk, on a year-round basis. CP 491. These Park

hours were in place on November 24, 2018—the day of Biggs' accident. *Id*.

The fact the Park closes at dusk is displayed on signs PSE posted around the perimeter of the Park and in the parking lots. CP 491. Specifically, the upper park (where Biggs fell) includes two types of signs both of which provide information regarding Park closure: (1) "Instructional and Educational" signs; and (2) signs whose ***only*** purpose is to warn the public that the Park closes at dusk. CP 491-492, 498-523.

The Instructional and Educational signs include notice related to the Park (e.g., Park "closed at dusk," "no parking after dusk," and "[t]he Park is for your pleasure thanks to Puget Sound Energy"), as well as educational information about Park history, the Project, the Falls, the surrounding habitat, historical figures, and relevant excerpts of poetry. CP 491. The Instructional and Educational signs were installed in and around 2012 and were in place at the time of Biggs' accident. *Id*.

Below are two examples of Instructional and Educational signs that also reflect Park hours:

CP 504, 521.

Before Biggs' accident, PSE also had posted numerous signs throughout the Park for which the ***sole*** purpose was to notify the public that the Park closes at dusk. In 2017, PSE ordered 12"x12" and 12"x6" signs with black letters on a white reflective background stating, "**PARK CLOSED DUSK TIL**

DAWN." CP 491. These signs were placed throughout the perimeter of the Park, including at the base of the stairway next to the Lodge which leads to the Park entrance and at the landing at the top of the same stairway next to a sign advising "No Drone or UAV Flying Allowed." CP 491-492. Below are four examples of the "**PARK CLOSED DUSK TIL DAWN**" signs:

CP 502, 511, 514, 517.

In addition to the "**PARK CLOSED DUSK TIL DAWN**" signs, PSE notified the public that the Park closes at dusk through signs posted in the East Parking Lot, at the entrance to the footbridge from the East Parking Lot leading to the entrance to the Park, the West Parking Lot, and under the

footbridge at the entrance to the Salish Lodge parking area. CP 492. Six examples of these signs include:

CP 498, 500, 506, 508, 519, 523. All these signs were in place on November 24, 2018. *Id*.

Below is an overhead map of the Park identifying by blue numbers the location of 12 signs posted throughout the Park notifying the public that the Park closes at dusk:

CP 492, 525.

2. Websites Notify the Public About Park Hours.

Websites also notify the public that the Park closes daily at dusk. For example, "SnoqualmieFalls.com" states: "The free parking and free viewing area are open from dawn until

dusk." CP 38, 39. "Smalltownwashington.com" states: "The park is open 7 days a week from sunup to sundown." CP 40. These are familiar park hours for Washington recreators. All day-use areas at Washington State Parks close "at dusk." *See* https://www.parks.wa.gov/179/Rules-regulations.[1]

B. PSE Illuminates the Park at Night to Discourage Vandalism and Assist Employees Who Open and Close the Park.

PSE installed lighting at the Park during a 2013 renovation. CP 47-48. The location of the lighting has not changed since. *Id.* The lighting was installed to reduce vandalism in the Park. *Id.* It also helps employees who open and close the Park each day. *Id.* The Park is not lit at night for the public; the Park is closed at night—as reflected by the many posted signs regarding Park hours. *Id.* The Falls themselves are lit at night at the request of Salish Lodge. *Id.*

[1] The fact the Park closes at dusk also is stated in PSE's public FERC submissions. CP 227.

C. Over 20 Million Recreational Users Enjoyed the Park Between 2005 and 2018—Yet PSE Only Had One Claim from a Person Falling in the Upper Park.

Public recreational opportunities are an integral component of the FERC license issued to PSE. CP 199. FERC requires hydroelectric licensees, like PSE, to monitor and report estimated recreation use levels. CP 308. PSE complies with this requirement by submitting recreation monitoring reports to FERC. CP 191-242, 246-304, 306-440, 442-489.

As PSE's monitoring reports provide, more than 1.5 million people were visiting the Park on an annual basis as of June 2005. CP 199. As of March 2009, the number of annual visitors was approximately 1.8 million people. CP 302. By 2015, the annual number of visitors was 1.6 million, with almost 1.2 million of these visitors visiting the upper park. CP 327. In the 2022 Recreation Monitoring Report, despite COVID-19, the Park attracted an estimated 1.6 million annual visitors, with nearly 1 million of them visiting the upper park. CP 464. In other words, between 2005 and November 24, 2018

(the date of Biggs' accident) the Park had over 20 million recreational visitors.[2]

PSE had received only one claim of a person falling in the upper park during this same time period. That claim was based on a fall occurring on the night of December 15, 2014, after the Park had closed, allegedly due to a light being out near the stairs where the fall occurred. CP 100; CP 50-51. There were no other reported falls. PSE acknowledges it is always possible there could have been unreported falls; however, the actual non-speculative evidence available to the parties reveals just one claim by one person out of 20,000,000 visitors over this 13-year period.

[2] 1.5 million annual visitors from 2005 through 2008 totals six million visitors. 1.8 million annual visitors from 2009 through 2014 totals 10.8 million visitors. 1.6 million annual visitors from 2015 through 2017 totals 4.8 million visitors. The combined total equals 21.6 million.

D. Biggs Visited the Park 30+ Times Before her Accident.

Biggs is familiar with the Park. She has lived in nearby North Bend since 1996. She has been to the Lodge numerous times. CP 59-60. She has been to the Park more than the Lodge—probably 30 times or more. CP 61, 65. She used to fish the river below the Park when she was a child and first went to the Lodge when she was around 12. CP 60, 61. She got engaged to her current husband in the Park in 1996. CP 57. She attended her sister's wedding at the Lodge in 2016/2017 and visited the Park at that time. CP 63. She has previously walked on the same stairs on which she fell in 2018. CP 64, 82.

Biggs has been all around the upper park during her more than 30 visits to the Park. She has parked in the West Parking lot (where signs 9 and 10 are located on the map above). CP 66. She has parked in the East Parking lot (where signs 1 and 2 are located). CP 84. She has walked over the footbridge from the East Parking lot to the Park (where signs 3, 4, and 5 are located). CP 84. She has climbed the stairs next to the Lodge

which lead to the Park (where signs 7 and 8 are located).[3] CP 68-70. There are signs at each of these locations notifying the public that the Park closes at dusk. CP 492, 496-525.

Notably, in her deposition, Biggs did not testify that the Park closure signs were not present or that she had never seen them before. She only testified she does not "recall" having seen them:

> Q. As you sit here today, is your testimony that before your November 24th, 2018 fall you had never seen a sign saying "park closed"?
>
> A. No. I'm saying I don't recall seeing it.

CP 85.

E. The November 24, 2018 Accident: Biggs Entered the Park at Night, Walked Past Two "PARK CLOSED DUSK TIL DAWN" Signs, and Injured Herself.

Biggs and her husband were staying at the Lodge on November 24, 2018. CP 59, 85. They arrived at the Lodge around 4:00 p.m. and had dinner there at 6:00 p.m. CP 62, 92-

[3] As discussed below, this is the route Biggs took on the night of her accident.

93. Around 8:00 p.m., they went to the Park to view the Falls. CP 67, 83. It was nighttime, it was dark out, and it was chilly. CP 74. They left the Lodge, walked through the parking lot toward the entrance to the Park, and turned left to walk up stairs leading to the Park entrance. CP 92. A sign denoting the entrance to the Park is located at the bottom of the stairs they climbed and immediately below that sign—on the same pole—is another sign stating: "**PARK CLOSED DUSK TIL DAWN**." CP 491-492, 510-512, 525. Photographs of these signs during the day and at night, respectively, are reprinted below:

CP 510, 512. Notwithstanding the signs, Biggs and her husband proceeded to climb the set of stairs next to the Lodge to enter the Park. CP 92. The Park was closed when they entered it. CP 46, 491.

At the top of the stairs, Biggs recalls seeing a sign advising "No Drone or UAV Flying Allowed," but claims not to recall having seen the more conspicuous sign to the left warning the public, "**PARK CLOSED DUSK TIL DAWN**." CP 71-72, 85-87, 92, 546, 549. Below is a photograph of the signs taken by Biggs' husband two weeks after the accident and a separate photograph taken (without flash) at night:

CP 97, 515. In other words, on the night of her fall, Biggs undisputedly walked by two of PSE's posted "**PARK CLOSED DUSK TIL DAWN**" signs.

At the landing at the top of the stairs shown above, Biggs and her husband took a photograph of the Falls illuminated at night. CP 71-73. The photograph they took captured only a portion of the Falls, so they chose to walk further into the Park to the observation deck to get a picture of the entire Falls. *Id*. They elected to take the stairway, rather than the pathway. CP 75-76. Without utilizing the available handrails on the stairs, they walked side-by-side down the center of the stairway. CP

77. They navigated most of the stairway without issue but fell on the last two steps claiming they could not see them. CP 79-80. They were not looking down at the walkway at the time of the fall. CP 81. Biggs alleges her fall was caused by a poorly lit and unmarked set of stairs at the location of her fall and asserts a negligence claim against PSE accordingly. CP 2-3.

F. Procedural History

Biggs filed a complaint for negligence against PSE in August 2021 in King County Superior Court, CP 1-4, and the case was assigned to the Honorable Judith Ramseyer. PSE denied Biggs' allegations and asserted affirmative defenses, including immunity under Washington's recreational use immunity statute, RCW 4.24.210. CP 7-10.

After discovery, PSE filed a summary judgment motion. CP 12. PSE argued: (1) Biggs was trespassing as a matter of law at the time of her fall because she undisputedly entered the Park after it had closed and thus PSE did not owe her the duty of ordinary care she alleged was breached; and (2) that PSE

would be entitled to recreational use immunity regardless, because the stairs where Biggs fell are not dangerous as a matter of law and that PSE conspicuously posted numerous signs throughout the Park warning that the Park was closed after dusk. CP 25-31.

The trial court agreed with PSE. CP 614-615. Judge Ramseyer granted summary judgment on trespass, reasoning that the "overriding factor" is the signage PSE posted throughout the Park. VRP 23-24. PSE's signs make it "unequivocal" that the Park is closed from dusk until dawn like all Washington day-use parks, removing any "potential ambiguity or questions of fact" suggesting PSE gave Biggs implied invitation to use the Park at night, whether through lighting or otherwise. *Id.*

Judge Ramseyer also concluded that summary judgment would be required under recreational use immunity regardless. She reasoned that the undisputed years of statistics detailing the massive volume of recreational use without incident at the Park

demonstrate that the stairs where Biggs fell were not dangerous as a matter of law when used during permitted hours, *i.e.*, when the Park is open to the public for recreational use. VRP 24-27.

The rationale from Judge Ramseyer's oral ruling was incorporated into her written order granting the motion. CP 614-615. Biggs' appeal followed. CP 616-619.

The Court of Appeals, Division One, affirmed in a unanimous unpublished decision. It reasoned that, given the undisputed signs posted, Biggs was trespassing as a matter of law at the time of her accident and affirmed the dismissal of her negligence complaint accordingly. Slip op. at 3-7 (citing and discussing Washington and Restatement law). The Court also refused Biggs' invitation to apply the "constant trespasser" doctrine, a doctrine rejected in Washington. *Id.* at 7 n.2. Finally, because it affirmed on trespass, the Court of Appeals declined to address recreational use immunity. *Id.* n.3.

Biggs seeks review of the first two issues only.

III. ARGUMENT

A. Biggs' Petition Does Not Meet the RAP 13.4(b) Standard.

Biggs' Petition should be denied. A petition for review will be accepted "only" when it meets the RAP 13.4(b) standard. Biggs argues for review under RAP 13.4(b)(1), (2), and (4). However, as discussed below, there are no appellate conflicts—and the premises liability issues, which depend on applying long-settled Washington common law, do not constitute issues of substantial public interest requiring this Court's determination.

B. The Court of Appeals Faithfully Applied Washington Precedent in Affirming Biggs' Status as Trespasser.

1. Whether a Person Is a Trespasser Depends on Whether the Possessor of the Property Gives the Person Permission to Enter the Property.

It is black-letter premises liability law that "[a] 'trespasser,' for purposes of premises liability, is one 'who enters the premises of another without invitation or permission, express or implied, but goes, rather, for [her] own purposes or

convenience, and not in the performance of a duty to the owner or one in possession of the premises.'" *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997) (quoting *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966)). "A 'licensee,' on the other hand, is 'a person who is privileged to enter or remain on land only by virtue of the possessor's consent.'" *Id*. (quoting *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 133, 875 P.2d 621 (1994.)

Whether a person is a trespasser or licensee "hinges on" whether the possessor of the land has granted consent or given permission to enter the property. *Id.* The possessor "may consent to a licensee's entry through conduct, omission, or by means of local custom, as well as through oral or written consent." *Id*. (citing Restatement (Second) of Torts § 330).

However, as the Court of Appeals properly determined, a possessor's grant of consent is only as broad as the permission given. Slip op. at 3-4. The possessor may also withdraw consent to entry. *Singleton*, 85 Wn. App. at 840. Notice that

consent has been withdrawn can be conveyed in a variety of ways, ***including by posting a sign***. *Id*. (quoting § 330, cmt. e).

2. PSE's Numerous Signs Throughout the Park Undisputedly Withdraw its Consent for the Public to Use its Park After Dusk.

PSE undisputedly grants the public consent to enter the Park daily from dawn until dusk. Members of the public therefore are licensees while they use the Park during the day. However, PSE's consent for the public to enter the Park is withdrawn daily from dusk until dawn. The fact that PSE's consent is withdrawn daily at dusk is supported by the numerous signs indicating the hours of operation and stating "**PARK CLOSED DUSK TIL DAWN**," which are posted throughout and around the perimeter of the Park.

3. Biggs Was Trespassing as a Matter of Law When She Entered the Park After it Closed.

Biggs admits she entered the Park on the night of the accident to view the Falls and not in the performance of a duty for PSE. Further, it is undisputed PSE did not give Biggs permission to enter or remain in the Park after dusk. It is

undisputed PSE posted numerous signs at entrances and throughout the Park notifying the public "**PARK CLOSED DUSK TIL DAWN**." *See also* App. Br. at 42 (acknowledging sign "warns" "Park is closed at dusk"). It is undisputed Biggs walked by two of the signs warning her "**PARK CLOSED DUSK TIL DAWN**" on her walk into the Park immediately before her fall. In fact, it is undisputed during her more than 30 previous visits to the Park, Biggs has been all over the upper park and would have walked past these two and many other signs posted to notify the public about Park hours. Finally, it is undisputed the Park hours are made known to the public beyond the numerous posted signs throughout the Park—in publicly accessible websites and PSE's FERC filings—and are consistent with Washington State Parks' day-use areas.

4. The Court of Appeals Properly Applied Washington Premises Liability Law—No RAP 13.4(b) Conflict Exists.

Biggs states the Court of Appeals' decision "conflicts" with *Singleton* and the Restatement (Second) of Torts § 330,

but never explains how. The Court of Appeals decision discusses both authorities at length and appropriately grounds its decision on these authorities. Slip op. at 3-5.

In *Singleton*, Division Two held that a door-to-door solicitor was not a trespasser, but rather a licensee, because there were no "No Trespassing" or "No Solicitation" signs posted anywhere. 85 Wn. App. at 840-42. Because there were no such signs posted anywhere,[4] it was reasonable for the plaintiff in *Singleton* to believe she had permission to approach the front door of the defendant's residence. *Id.*

Here, the evidence is undisputedly to the contrary. There were signs—many of them—posted throughout the Park, including along the path Biggs took on the night of her fall.

[4] The court clarified not only were there no "No Trespassing" or "No Solicitation" signs, but there also was a small sign directing persons to enter from the driveway to an "Office," which placed persons on notice that commercial activity was occurring. 85 Wn. App. at 842. The court unremarkably held that this sign "cannot be construed as a withdrawal of permission to enter." *Id.*

Each sign conveyed when the Park is closed to the public: "**PARK CLOSED DUSK TIL DAWN**." The signs undisputedly were posted on the night of Biggs' fall, and undisputedly reflect that consent to the public to use the Park is withdrawn from dusk until dawn.

With these undisputed facts, the Court of Appeals was correct to conclude as a matter of law that Biggs was trespassing at the time of her accident. *Cf., Singleton,* 85 Wn. App. at 839. *Singleton* is not in conflict with the Court of Appeals decision—*Singleton* supports the decision.

So too does Restatement (Second) of Torts § 330. Biggs quotes cmt. (e) from § 330, but by using an ellipsis, glosses over the key language relied upon by the Court of Appeals. *Compare* Pet. at 21 (quoting cmt. (e) with ellipsis), *with* Slip. op. at 4 (quoting cmt. (e) without ellipsis – possessor's consent to enter land may be implied "***unless he posts a notice to the contrary***") (emphasis in original). PSE undisputedly "post[ed] a notice to the contrary."

Biggs cites other Washington cases as "conflicts." None are. Biggs cites *Grimsrud v. State*, 63 Wn. App. 546, 821 P.2d 513 (1991). Pet. at 19, 24. *Grimsrud* is a road design case, not a premises liability case. Mr. Grimsrud was injured on SR 97 after the roadway had been paved with an abrupt lane change installed as a result. 63 Wn. App. at 548. He argued the State was negligent for failing to adequately warn motorists of the lane change. *Id.* He offered evidence that the location of the warning signs prevented them from being seen by motorists. *Id.* at 551-52. There was no issue whether Mr. Grimsrud was legally permitted to be using the roadway in the first place, or whether signage could provide notice that permission to be on the property was revoked as in *Singleton*.[5]

[5] Biggs cites *Bartlett v. Northern Pac. Ry. Co.*, 74 Wn.2d 881, 447 P.2d 735 (1968), but does not attempt to explain how *Bartlett* "conflicts" with the Court of Appeals decision. Like *Grimsrud*, *Bartlett* is not a premises liability case and does not address how signage can provide notice that permission to be on land is revoked.

Biggs cites *In re PRP of Harvey*, 3 Wn. App. 2d 204, 415 P.3d 253 (2018). Pet. at 19, 20. *Harvey* addresses whether a criminal defendant had implied consent to enter a private parking lot of an apartment complex where he shot two people. 3 Wn. App. 2d at 216. The issue was whether Mr. Harvey and his girlfriend had any possible permission or consent—or any legitimate reason at all—to be at the apartment complex. *Id.* at 216-17. There is no discussion of signs revoking consent as in *Singleton*.[6] *Id.* There is no RAP 13.4(b) conflict.

Ms. Biggs cites *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 21 P.3d 723 (2001). Pet. at 19, 21. That case also does not involve signage and, thus, there also is no RAP 13.4(b) conflict. *Botka* addresses whether a hospice worker had express permission to enter a home. 105 Wn. App. at 983. The worker

[6] *Harvey* cites *Singleton* for the proposition that a possessor of property may give implied consent for one to enter. 3 Wn. App. 2d at 216. *Singleton* further holds implied consent may be revoked by posting a sign. 85 Wn. App. at 839-40. This holding, though relevant here, was not relevant to *Harvey* and therefore not discussed in *Harvey*.

knocked on the door, entered the home, opened another door, and fell in an elevator shaft. *Id.* at 977-78. The plaintiff offered evidence she had permission to enter the home, including authorization to be on the second floor of the home where she fell. *Id.* at 983-84. The case does not involve a posted sign, much less one expressly revoking consent.

Finally, Biggs cites *Rogers v. Bray*, 16 Wn. App. 494, 557 P.2d 28 (1976) as conflicting with the Court of Appeals decision. Pet. at 19, 23. *Rogers* holds there is a question of fact on whether a person injured while traveling on a well-used roadway is a trespasser in "the absence of a sign warning travelers that the … road was not for public use." 16 Wn. App. at 557. *Rogers* does not address whether there would be such a question of fact when, as here, there are many signs and other forms of notice.[7]

[7] Also, *Rogers* is an apparent public highway case relying on a unique section of the Restatement accordingly. 16 Wn. App. at 496 (citing Restatement (Second) of Torts § 367).

In short, none of the cases Biggs cites constitutes a RAP 13.4(b) conflict. None addresses the effect on Biggs' status (trespasser, licensee, etc.) given the signs PSE posted stating the Park is closed at dusk. None addresses that consent to enter the Park, whether express or implied, can be revoked by posting signs and other forms of express notice.

C. Washington Does Not Apply the "Constant Trespasser" Doctrine.

Biggs separately argues review is warranted because the Court of Appeals "fail[ed] to follow" Washington appellate precedent regarding the so-called "constant trespasser" doctrine. Biggs is incorrect.

Washington applies the "General Rule" of trespass: Restatement (Second) of Torts § 333. *Singleton*, 85 Wn. App. at 839; *Zuniga v. Pay Less Drug Stores, N.W.*, 82 Wn. App. 12, 14, 917 P.2d 584 (1996). The General Rule states a possessor of land is not liable to trespassers for failing to exercise ordinary care. *Singleton*, 85 Wn. App. at 839 (citing § 333); *Zuniga*, 82 Wn. App. at 14 (same).

The "constant trespasser" doctrine is an exception to the General Rule. It is featured in sections 334 and 335 of the Restatement. There are evidentiary requirements a plaintiff must meet to qualify under this doctrine, e.g., "constant" trespassing in a "limited area" risking "death or serious bodily harm." Restatement (Second) of Torts §§ 334, 335. Biggs has not supplied evidence supporting these requirements. *See* 1 Law of Premises Liability § 2.04 (2023) (discussing "constant trespasser" doctrine requirements).

Nor would it matter if she had. As the Court of Appeals correctly notes, Washington is one of the jurisdictions that has ***not*** adopted the "constant trespasser" exception to the General Rule of trespass. Slip. op. at 7 n.2 (citing *Sikking v. National R.R. Passenger Corp.*, 52 Wn. App. 246, 248-49, 758 P.2d 1003 (1988)). *Sikking* is an appeal from summary judgment dismissing a personal injury claim brought by an admitted trespasser severely injured when a train struck him on the tracks. 52 Wn. App. at 247. The trial court applied

Washington's General Rule of trespass and dismissed the complaint because there was no evidence of willful or wanton misconduct. *Id.* On appeal, the plaintiff argued the trial court should have applied the "constant trespasser" exception to the General Rule and permitted liability upon showing a violation of ordinary care. *Id.* at 247-48.

The Court of Appeals disagreed and affirmed. *Id.* at 248-50. The court noted other states have adopted the "constant trespasser" doctrine, but Washington has not. *Id.* at 248. The court distinguished prior Washington cases—including *Clark v. Longview Public Serv. Co.*, 143 Wn. 319, 255 P. 380 (1927)—and concluded that adopting the "constant trespasser" doctrine would blur the common law distinctions between invitee, licensee, and trespasser that the Washington Supreme Court has "routinely" refused to do. *Sikking*, 52 Wn. App. at 248 (citing *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986)); *see also Price v. Seattle*, 106 Wn. App. 647, 653, 24 P.3d 1098 (2001) (adherence to common law classifications of trespasser,

invitee, and licensee provides "stability and predictability" not afforded by "'unitary standard' of reasonable care under all of the circumstances").

Although claiming error, Biggs acknowledges "there are no Washington cases directly analyzing this section [§ 335] of the Restatement." Pet. at 28. Nor does Biggs argue *Sikking* was wrongly decided or otherwise conflicts with the Court of Appeals decision here.

Instead, Biggs argues the Court of Appeals should not have distinguished *Clark*. However, *Clark* is distinguishable—and, indeed, was distinguished in *Sikking*. In *Clark*, the Court held that, given the risk of death, the owner of high-voltage electricity has a duty to reasonably guard against all persons including trespassers from contacting high-voltage power lines. 143 Wn. at 323. As Division Two reasoned in *Sikking*—61 years after *Clark*:

> In *Clark*, the court focused on the type of instrumentality involved [high-voltage wires]. . . . The court in *Clark* relied on numerous cases from

> other jurisdictions regarding the proper handling of electrical power lines. Furthermore, the rule in *Clark* has not been applied to any instrumentality outside of the handling of high-voltage power lines.[8] Therefore, it would be inappropriate to infer the court's acceptance of the Constant Trespasser Doctrine solely on the basis of the holding in *Clark*.

Sikking, 51 Wn. App. at 249.

The Court of Appeals here followed the Court of Appeals in *Sikking*. Slip Op. at 7 n.2. This is neither error nor grounds for review under RAP 13.4(b).

Finally, Biggs argues § 335 of the Restatement has been cited as consistent with the definition of "artificial" for purposes of Washington's recreational use immunity statute. Pet. at 28-30 (citing *Schwartz v. King County*, 200 Wn.2d 231, 240 n.3, 516 P.3d 360 (2022)). However, Biggs does not seek review of the decision dismissing her claims on recreational use grounds, and the point footnoted in *Schwartz* is far from

[8] This has remained true in the 36 years after *Sikking*.

announcing that Washington has adopted the "constant trespasser" exception.

IV. CONCLUSION

The Court should deny the Petition.

I certify that this document contains 4,978 words, in compliance with RAP 18.17.

Respectfully submitted this 22nd day of March 2024.

GORDON TILDEN THOMAS & CORDELL LLP
Attorneys for Respondent Puget Sound Energy, Inc.

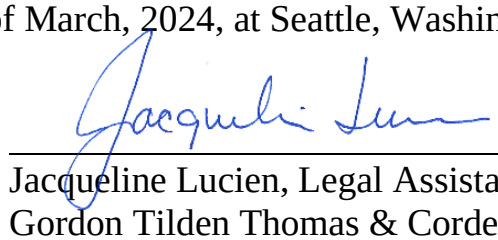
By *s/Mark Wilner*
Jeffrey M. Thomas, WSBA #21175
Mark Wilner, WSBA #31550
Matthew F. Pierce, WSBA #34019
600 University Street, Suite 2915
Seattle, Washington 98101
Tel. 206.467.6477
jthomas@gordontilden.com
mwilner@gordontilden.com
mpierce@gordontilden.com

CERTIFICATE OF E-SERVICE

I certify that I initiated electronic service of the foregoing document via the Court's eFiling Application to counsel of record:

Counsel for Petitioner*:*
Joseph A. Grube, WSBA #26476
Karen Orehoski, WSBA #35855
Grube Orehoski, PLLC
1200 Fifth Avenue, Suite 1711
Seattle, WA 98101

DATED this 22nd day of March, 2024, at Seattle, Washington.



Jacqueline Lucien, Legal Assistant
Gordon Tilden Thomas & Cordell LLP

GORDON TILDEN THOMAS CORDELL LLP

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